

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION  
3 ATHENA CONSTRUCTION GROUP, ) Case 1:21-cv-396  
INC., )  
4 )  
Plaintiff, )  
5 )  
v. ) Alexandria, Virginia  
6 ) June 2, 2021  
WILLIAM M. SMITH, III, ) 9:27 a.m.  
7 and )  
RE CONSTRUCTION, LLC, )  
8 )  
Defendants. )  
9 ) Pages 1 - 37

10 TRANSCRIPT OF PLAINTIFF'S MOTION TO STRIKE DEFENDANTS'  
11 SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION TO  
12 DISMISS  
13 AND  
14 DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED  
15 COMPLAINT  
16 VIA ZOOMGOV VIDEOCONFERENCE  
17 BEFORE THE HONORABLE ANTHONY J. TRENGA  
18 UNITED STATES DISTRICT COURT JUDGE  
19  
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24

25 COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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1 THE COURT: Good morning. Court is in  
2 session.

3 Please call the case.

4 THE CLERK: Civil Action No. 1:21-cv-396,  
5 *Athena Construction Group, Inc. v. Smith, et al.*

6 Counsel, will you please note your  
7 appearances for the record.

8 MR. DOWNEY: Good morning, Judge. Jeff  
9 Downey for the defendant, William Smith. I'd also like  
10 to introduce Glenn Ellis, who has been *pro hac* into  
11 this case. He'll be making the arguments today on  
12 behalf of the defendant.

13 THE COURT: All right. Welcome.

14 MR. ELLIS: Good morning, Your Honor.

15 MR. GUTHERY: Good morning, Your Honor.  
16 Craig Guthery representing plaintiff, Athena  
17 Construction Group.

18 THE COURT: All right. Let me put on the  
19 record that to the extent there are any members of the  
20 public on the line, you're directed not to speak during  
21 this videoconference and to keep your line on mute  
22 during the entirety of the hearing.

23 Additionally, any person remotely  
24 participating in or listening to this proceeding may  
25 not record or cause to be recorded any such proceeding.

1 Nor may any person rebroadcast, livestream, or  
2 otherwise disseminate any live or recorded audio or  
3 video of this proceeding. Any violation of this  
4 prohibition may result in sanctions as the Court deems  
5 necessary and appropriate.

6 We're here on defendant's motion to dismiss.  
7 I've reviewed the briefing and would be pleased to hear  
8 further from counsel.

9 Mr. Ellis.

10 MR. ELLIS: Good morning, Your Honor. Again,  
11 I represent the defendants in this case, Bill Smith --  
12 or William Smith and RE Construction.

13 We've moved for dismissal on two grounds,  
14 essentially. One is that these claims are time-barred  
15 by the applicable statute of limitations and, two, that  
16 even though the complaint alleges a complex conspiracy  
17 involving computer hacking, the factual allegations in  
18 the complaint are beyond threadbare. They are  
19 virtually nonexistent. I believe there are only three  
20 or four facts, and those facts don't speak directly to  
21 the claims or support the claims.

22 And overlaying all of this, Your Honor, is  
23 the public policy considerations of allowing this kind  
24 of collateral attack on the relator in a different  
25 forum, which is really just set up to harass and make

1 the life of the relator and his attorneys more  
2 expensive and more difficult.

3           If Athena truly believed that they had claims  
4 under these various computer crimes statutes, they  
5 could have brought a cross-claim in the forum where the  
6 relator's false claims action is, which is in the  
7 district of D.C. under Judge Mehta. They could have  
8 gotten the same discovery. They could have gotten the  
9 same relief.

10           Instead, what they've chosen to do for the  
11 third time, since the relator reported his allegations  
12 of fraud to the government, is sue him in state court,  
13 which then has been removed to this court. The first  
14 action was dismissed.

15           THE COURT: I'm familiar with that history.

16           MR. ELLIS: Right. And what it has done is  
17 it's caused extreme expense to the relator. He's had  
18 to get local counsel. All the attorneys have had to  
19 spend time on this. And what we're looking at is a  
20 very contentious discovery, and we're looking at, you  
21 know, essentially a whole other district court having  
22 to deal with this case when all of these claims could  
23 have been dealt with in Judge Mehta's courtroom.

24           So overlying the procedural issues that we've  
25 raised in our motion to dismiss is the public policy

1 considerations of allowing these kind of collateral  
2 attacks to proceed.

3 THE COURT: Well, what I'm concerned about is  
4 what the basic facts of this case are in light of the  
5 forensic report that's been referenced in the complaint  
6 and which the Court does regard as integral to the  
7 complaint. The Court can consider the substance of it  
8 even if it's inconsistent with the allegations in the  
9 complaint.

10 We're dealing with, as I understand it, an  
11 external hard drive as alleged --

12 MR. ELLIS: Yes, Your Honor.

13 THE COURT: -- that exists separate and apart  
14 from the plaintiff's computer system. Is that right?  
15 Is that accurate?

16 MR. ELLIS: That is correct, Your Honor.

17 THE COURT: And I'll certainly ask  
18 Mr. Guthery about this, but why don't you tell me what  
19 you believe the facts are, as reflected in the  
20 complaint, given the substance of the forensic report.

21 MR. ELLIS: Well, the forensic report -- and  
22 the reason why we attached it and we thought it was  
23 important for the Court to look at -- is not the same  
24 as what is alleged in the complaint. There are several  
25 allegations in the complaint that are attributable

1 supposedly to this forensic report.

2 But if Your Honor actually looks at the  
3 forensic report, the only thing that TransPerfect was  
4 asked to look at was whether or not anyone had accessed  
5 that hard drive after the relator, Mr. Smith, had left  
6 Athena. And that is, essentially, the only conclusion  
7 that they reached, that someone had taken that external  
8 hard drive and accessed it, meaning just opened it.

9 THE COURT: Right. Well, that's not  
10 accessing the plaintiff's computer system; is it?

11 MR. ELLIS: Absolutely not, no, Your Honor.  
12 And, in fact, the allegation -- it appears that someone  
13 at RE Construction put their medical records on this  
14 hard drive thinking that it was just a hard drive  
15 available to use.

16 There's no evidence that anyone -- any of the  
17 defendants -- any factual allegations that Athena's  
18 property was broken into, that their computers were  
19 accessed in the middle of the night where this hard  
20 drive was connected and information was downloaded off  
21 of their network onto the hard drive. There's no  
22 allegations that anyone at RE Construction reviewed  
23 those documents. There's no evidence that anyone at RE  
24 Construction used them, for example, in a bidding  
25 process or used them in any way.

1           The only allegation and the only thing that  
2 the forensic analysis did was that the hard drive was  
3 accessed. But plaintiffs knew the hard drive was  
4 accessed because in September 2018, they were told by  
5 relator's counsel before Judge Mehta that the hard  
6 drive existed, that the hard drive had been accessed by  
7 the relator's attorneys, that documents were  
8 downloaded, that the documents were Athena's internal  
9 documents, business documents relating to the time that  
10 the relator was employed there, and that those  
11 documents were appended to an Amended Complaint and  
12 provided to the government. So in 2018, they knew it  
13 was accessed.

14           THE COURT: Do I understand correctly that,  
15 at least reflected in the forensic report, the actual  
16 files on the hard drive, you can tell when those were  
17 actually put on that hard drive, and those precede  
18 January 2016? Is that accurate?

19           MR. ELLIS: That is correct, Your Honor.

20           If you look at the supplemental and the  
21 attached forensic report, according to Mr. Lyle, there  
22 is a column on that spreadsheet that contains all  
23 13,000 documents. That column is called the file  
24 created document. While it is exceedingly difficult to  
25 see -- and I had to use a magnifying glass myself -- if



1 you look through all of those pages -- over 100 pages,  
2 I believe, of printout -- you will see that all 13,000  
3 except for the 24 files relating to RE Construction's  
4 medical records and their QuickBooks files, all of them  
5 were downloaded onto that hard drive before Mr. Smith  
6 was terminated by Athena.

7           That's important, Your Honor, as you know.  
8 Because if plaintiffs can't prove that Mr. Smith did  
9 not have authority to download, all of these, whether  
10 it's the federal or the Virginia Computer Crimes Act,  
11 fall because they all require an unauthorized access to  
12 the hard -- to the networks and computers of the  
13 plaintiff. If he had authority -- because he did. He  
14 was the superintendent. He was the highest official  
15 under -- with regards to construction. So underneath  
16 the two owners, he had authority to download them. He  
17 did.

18           The only remaining claim would be potentially  
19 a conversion claim or him walking away with the hard  
20 drive after his termination. But that claim was  
21 already filed, and that claim was already dismissed by  
22 Athena in their second Virginia lawsuit. And they  
23 don't bring that claim here. So there's no claim here  
24 for the taking of the physical property. In fact,  
25 Athena claims that the hard drive itself is not theirs.

1           So we think -- we argue and we believe that  
2 this analysis --

3           THE COURT: Was that earlier Virginia case  
4 dismissed with prejudice?

5           MR. ELLIS: It was voluntarily withdrawn.  
6 Interestingly, it was filed within the statute of  
7 limitations, but they withdrew it.

8           THE COURT: You're not raising any *res*  
9 *judicata* claim based on that earlier case?

10          MR. ELLIS: No, Your Honor. We're simply  
11 referring to it as the basis that they were on notice.

12          THE COURT: All right.

13          MR. ELLIS: And they filed the lawsuit with  
14 relations to this hard drive, and then they withdrew  
15 that lawsuit. And then they waited 11 months after  
16 TransPerfect gave them the report before they filed  
17 this case.

18          The only other thing I'll say with regards to  
19 timing, Your Honor, is they had the report from  
20 TransPerfect which underlays this entire case. They  
21 waited 11 months. They waited about a month after the  
22 government declined, and plaintiff and the relator  
23 decided to proceed. There's no coincidence that that  
24 is the timing of when this lawsuit was filed. This  
25 lawsuit is just a third slap lawsuit, the third

1 harassing lawsuit, the third retaliation lawsuit  
2 against Mr. Smith and has no basis.

3 I would only ask the Court to look carefully  
4 at the timing of this with regards to the statute of  
5 limitations argument. We think that Athena has not  
6 acted reasonably. They knew in September 2018 that  
7 this hard drive existed, that it had been reviewed,  
8 that files had been copied, that they were internal  
9 documents, and that there were thousands of pages.  
10 They waited 14 months before they asked for it back,  
11 and then they waited 11 months after their analysis  
12 before they filed suit.

13 So even if the Court were to adopt a  
14 discovery rule analysis, we don't believe that they  
15 have acted reasonably, as a company should, once they  
16 were put on notice that a third party had their  
17 supposedly incredibly valuable internal documents.

18 So even under a discovery rule analysis, we  
19 believe that they fail to show reasonableness in their  
20 actions, and the complaint is completely silent, Your  
21 Honor, on what they did. Did they conduct an internal  
22 investigation before the analysis? Did they analyze  
23 their networks? Did they interview employees to see if  
24 Mr. Smith was on the property? Did they analyze their  
25 network for illicit downloads? Did they analyze the

1 key cards, the doors to see if Mr. Smith had gained  
2 entry? They're completely silent on that issue, Your  
3 Honor.

4 THE COURT: Let me just make sure I  
5 understand your position. Your view is on the statute  
6 of limitations, Count 1 is barred by the two-year  
7 statute applicable to loss and not damage. And with  
8 respect to Counts 2, 3, 4, and 6, it's barred by -- you  
9 seem to rely on the two-year statute, but am I correct  
10 that your position is that it's barred under either the  
11 five-year or the two-year statute?

12 MR. ELLIS: Yes, Your Honor. It's barred  
13 under that and under the -- I think Athena brought up  
14 sort of an equitable tolling, an equitable estoppel  
15 tolling argument to argue that they were somehow  
16 precluded from knowing that their documents had been  
17 obtained and accessed.

18 So even -- regardless of that, even if you  
19 take the invitation to do that kind of analysis, if the  
20 Court were to look carefully at Athena's actions, they  
21 did not act as a reasonable corporation would,  
22 especially one of the claims, \$2 million worth of  
23 damages based on this relief.

24 Your Honor is absolutely right with regards  
25 to the federal crime -- the CFAA. There's no

1 allegation in the system itself that the data was  
2 impinged. For example, you would get the longer  
3 statute under the CFAA if these documents had been  
4 erased from Athena's database and only existed on the  
5 hard drive.

6 THE COURT: Right, if the files were  
7 corrupted in some way.

8 MR. ELLIS: Right. There's no allegation  
9 that they lost access to the files or even that they  
10 wanted to use the files or that the system was in any  
11 way damaged. So they would be under the two-year  
12 statute for that, and I think the statute is very clear  
13 when the court should adopt a discovery rule under  
14 that. We believe that claim should be out absolutely  
15 based off the two-year statute.

16 The only other thing that I'll bring to Your  
17 Honor's attention is we currently are engaged -- so far  
18 in this case, there's been a lot of motion practice  
19 already. There's a motion to quash that's going to be  
20 heard on Friday before the magistrate judge regarding  
21 our request to depose Mr. Lyle. We believe that  
22 Mr. Lyle should be deposed as a fact witness. His  
23 analysis underlies this entire case. Athena has  
24 objected claiming that we're not entitled to his  
25 deposition until expert discovery. That's the kind of

1 gamesmanship and hiding the ball that Athena is  
2 engaging in to draw this out.

3           They claim \$2 million worth of damages.  
4 They've produced no documents documenting the  
5 \$2 million worth of damages. They claim that no such  
6 documents exist. If they do exist, they're not going  
7 to produce them until they produce an economic expert  
8 report.

9           That's not appropriate. This case is going  
10 to be contentious if it goes forward in discovery.

11           Again, this case -- if Athena really truly  
12 believed they had merits, it should be before Judge  
13 Mehta and not before any court in Virginia.

14           I'll take any other questions and rest on our  
15 briefs, Your Honor.

16           THE COURT: All right. Thank you.

17           Mr. Guthery.

18           MR. GUTHERY: Yes, Your Honor. I think there  
19 was a lot of points that were made by Mr. Ellis.  
20 Hopefully, I'm going to hit all of them. I'm certain  
21 you'll ask questions if I miss any of them.

22           The main thing that I wanted to mention here  
23 is that filing a *qui tam* action does not negate past  
24 violations of law, and that's why this case is here.  
25 We filed this case because we discovered, after the

1 forensic analysis, that contrary to what Mr. Smith told  
2 Judge Mehta -- or Mr. Smith's counsel told Judge Mehta,  
3 this was not a hard drive that he found and was  
4 conducted by Athena as part of a regular backup system.  
5 That just simply was not the case. That was not true.

6           Our analysis showed that the hard drive was  
7 not even Athena's. Our analysis showed that files were  
8 copied to the hard drive within a week or two weeks or  
9 three weeks after judge -- after Mr. Smith was  
10 terminated.

11           THE COURT: Well, on that point, though, is  
12 that supported by the forensic report?

13           MR. GUTHERY: It is, Your Honor, and I'll  
14 address that right now. What Mr. Ellis is focusing on  
15 is a footnote in the report, footnote 6, that talks  
16 about the file created date. I looked at that footnote  
17 after it was brought up by Mr. Ellis. I recognized  
18 that there was an ambiguity to it. So I interviewed  
19 Mr. Lyle afterwards to find out what it was, and this  
20 is not what Mr. Ellis says that it is. The file  
21 created date is not the date that the files were copied  
22 onto the hard drive. It cannot be because many of the  
23 files that are on the hard drive have a file created  
24 date from 2011, some of them going back to 2005. The  
25 hard drive didn't even exist in 2005.

1 THE COURT: Well, what was accessed in  
2 January -- whatever the date was, January 2016 and  
3 February 2016? It was the external hard drive,  
4 correct?

5 MR. GUTHERY: The external hard drive was --  
6 it was modified on those dates in 2016, yes.

7 THE COURT: Right. And that external hard  
8 drive at that point in time existed separate and apart  
9 from the plaintiff's computer system, correct?

10 MR. GUTHERY: That is correct, Your Honor,  
11 yes.

12 THE COURT: How is that unauthorized access  
13 to the plaintiff's computer system?

14 MR. GUTHERY: The files only existed on  
15 plaintiff's computer system.

16 THE COURT: But they had already been  
17 downloaded onto the external hard drive, correct?

18 MR. GUTHERY: No, Your Honor. No, that is  
19 not correct. I understand where that is the  
20 distinctions coming back. Mr. Ellis is focusing on the  
21 file created date. The file created date is not the  
22 date that the file was put onto the hard drive. The  
23 file created date was the date that the file itself was  
24 actually created for the very first time. The file was  
25 created on Athena's systems on the dates that the file



1 created, 2012, 2013, some of them going back all the  
2 way to before that date.

3           But I can -- the reason that I can justify  
4 this or I can prove this to you, that the file created  
5 date does not represent the date that the files were  
6 copied to the hard drive, is the files on that hard  
7 drive where the file created date is from, in one case,  
8 2005. The hard drive was not even in existences at  
9 that time. So if the file created date is 2005 and the  
10 hard drive was not even created on that date, then,  
11 therefore, the file created date of 2005 cannot  
12 represent when the file was originally placed or was  
13 copied to the hard drive.

14           THE COURT: Why don't you speak to the  
15 statute of limitations issue.

16           MR. GUTHERY: Certainly, Your Honor.

17           Based, again, on the explanation that  
18 Mr. Smith gave to Judge Mehta and to Athena in 2018, we  
19 understood that the hard drive from him -- that he  
20 found it in his belongings and that it was a backup  
21 that was conducted by Athena. Well, Athena did not  
22 have possession of the hard drive, had no idea of  
23 knowing whether -- how the files were put on there.  
24 And so we could only rely on the statements that  
25 Mr. Smith made, that this was an Athena backup that

1 just happened to be in his personal belongings.

2 We discovered only after we got the hard  
3 drive back --

4 Incidentally, this was the second Virginia  
5 case. It was a conversion in detinue action that was  
6 brought by Athena once they learned that the hard drive  
7 was actually from Mr. Smith. Mr. Smith said that the  
8 hard drive was Athena's. We said, okay, well, let's  
9 get it back. They refused, forced us to bring this  
10 Virginia action. Then we eventually got it when they  
11 decided to surrender it and thereby dismiss the case.

12 When we got that hard drive, we gave it to  
13 our expert, to Mr. Lyle. It was Mr. Lyle's analysis of  
14 the hard drive that determined, most importantly --  
15 well, one of the most important things was that this is  
16 not an Athena hard drive. Contrary to what Mr. Smith  
17 told Athena and Judge Mehta, it was not an Athena hard  
18 drive that was created as part of a regular backup.  
19 This hard drive is from an unknown origin; yet, it was  
20 in Mr. Smith's possession.

21 Then when Mr. Lyle analyzed the hard drive,  
22 he found out that a week -- one week and three weeks  
23 after Mr. Smith's termination, 13,000 files were loaded  
24 to that hard drive.

25 THE COURT: As alleged, the violation

1 occurred, at the latest, on February 15, 2016, correct?

2 MR. GUTHERY: The violation -- that's what we  
3 see here, that there was copying of the hard drive that  
4 was done in February 2016, yes.

5 THE COURT: Right. And so the question is  
6 what statute of limitations starts to run as of that  
7 date, and why doesn't the two-year federal statute run  
8 from that date and the five-year statute run from that  
9 date?

10 MR. GUTHERY: Well, certainly, the two-year  
11 statute is tied to the discovery provision.

12 THE COURT: Well, that's if you characterize  
13 what was done as damages opposed to loss, correct?

14 MR. GUTHERY: That is correct, Your Honor.

15 THE COURT: Why is there damages in this  
16 case? You have not alleged any corruption of these  
17 files, any impairment of the company's ability to  
18 access these files or use these files. How is there  
19 any damage plausibly alleged in this complaint?

20 MR. GUTHERY: The damage is to the integrity  
21 of the secrecy of the files.

22 THE COURT: It's not a matter of secrecy.  
23 It's a matter of whether the files themselves have been  
24 damaged. There's no allegation of that; is there?

25 MR. GUTHERY: There's no allegation the files

1 on Athena's servers that were copied were themselves  
2 damaged. The damage that was done was to the integrity  
3 of the files themselves, that integrity, based on the  
4 fact that these are trade secrets and that by divulging  
5 the trade secrets, you did damage to the trade secrets.

6 THE COURT: Well, that would eliminate the  
7 distinction between loss and damage, wouldn't it, that  
8 view of what damage is? You would have damage in every  
9 case. You wouldn't need the loss provision.

10 MR. GUTHERY: Well, when you say the damage  
11 is -- well, you need the loss provision in --

12 THE COURT: When would you have loss or  
13 damage under your view?

14 MR. GUTHERY: Well, the *State Analysis* case  
15 from Judge Brinkema is an example of that. In that  
16 case, the files were -- it was data that was made  
17 available to subscribers to the service. And so that  
18 data was created with the specific express intention of  
19 sharing it with other people. What happened in that  
20 case is that there were people who were no longer  
21 subscribers that accessed the data. The loss there, of  
22 course, was the loss of the subscription fees. It was  
23 not the loss of any integrity of the data itself.

24 THE COURT: Well, in a similar sense, the  
25 loss in that case -- and I agree with you that the

1 facts are different in that case. But you had loss of  
2 secrecy in the sense that people who weren't entitled  
3 to have that information were given that information  
4 and had that information shared with them.

5 I have to tell you. I think your view of  
6 damage is so all-encompassing that it effectively  
7 eliminates the distinction that the statute creates  
8 between loss and damage.

9 But anyway, let's go on. What about the  
10 five-year statute? Why doesn't the five-year statute  
11 run as of February 15, 2016?

12 MR. GUTHERY: One of the reasons, Your Honor,  
13 is that we have information from the analysis that the  
14 copies were filed -- that there were copies made in  
15 January and February 2016, but there's also evidence in  
16 that modified date that there were dates afterwards  
17 that it happened as well. We just don't know, until we  
18 get into discovery, exactly the extent of the invasion  
19 of Athena's computers. And we -- I'm not sure what  
20 else to say about that, Your Honor. It is --

21 THE COURT: What allegations are there in  
22 here that support your substantive claim against the  
23 core defendant and also your conspiracy claims?

24 MR. GUTHERY: The substantive claim, Your  
25 Honor?

1           THE COURT: Yes, against the company.  
2 Because you don't -- you just lump the defendants  
3 together. You don't allege anything separate and apart  
4 with respect to RE Construction or any use by them  
5 or -- all you allege is Smith's conduct, and then you  
6 include both of them in your allegations.

7           MR. GUTHERY: I understand, Your Honor. The  
8 issue here is that relationship between the two  
9 defendants and the unity of purpose. In this case,  
10 Mr. Smith was -- not only are they related,  
11 father-in-law and son-in-law, they live together.  
12 Mr. Smith eventually became an employee of RE  
13 Construction.

14           THE COURT: Do you allege when that happened?  
15 Do you allege when he became an employee?

16           MR. GUTHERY: We do not know, Your Honor. We  
17 don't know. We don't learn something like that until  
18 we get into the discovery of the case. But we do know  
19 that he is an employee because that was revealed by the  
20 defendants, that Mr. Smith was -- did become at one  
21 time an employee, but I do not have the date, Your  
22 Honor.

23           So the thing is that RE Construction at the  
24 time that there was this close relationship between  
25 Mr. Smith and Mr. Ellis -- that continues today, but

1 certainly, there was that close relationship at that  
2 time RE Construction was engaged in litigation with  
3 Athena. Not only that, RE Construction was a  
4 competitor of Athena. So because of this combination  
5 and closeness between the parties, there was a  
6 knowledge that was going on about what was being done.

7           Mr. Smith had just been terminated for cause  
8 by Athena. And so the invasion of the computer and the  
9 copying of the file to the hard drive would have  
10 occurred within the same household as RE Construction  
11 and with the purpose that RE Construction would benefit  
12 from learning trade secrets from Athena.

13           THE COURT: There's no evidence or  
14 allegations here as far as how this downloading from  
15 Athena's computers to this external hard drive took  
16 place, under what circumstances, how Smith was able to  
17 do it. He was terminated. I assume his password had  
18 been terminated as well. There's no allegations of how  
19 that happened.

20           MR. GUTHERY: Your Honor, there are certainly  
21 suspicions, and suspicions cannot go into the  
22 complaint, obviously. We simply do not know. They  
23 covered his tracks so well that there was no evidence  
24 that we could see on the computer system from Athena.  
25 What we have is trade secrets and files of Athena that

1 are contained on a hard drive that never belonged to  
2 Athena, that are in the possession of a terminated  
3 employee with the motivation to use this information.

4           We do have the exact dates that they were  
5 copied. We have the dates that -- we have the  
6 information that is contained in these files. We know  
7 that it was -- that it was done -- again, that it was  
8 done after Mr. Smith's termination from Athena. And so  
9 making that connection, however, to knowing exactly  
10 when he accessed the computers, whether he did it under  
11 cover of night, whether he had assistance from someone  
12 at Athena, whether there was some other invasion that  
13 happened, we don't have that information because it is  
14 something that is going to have to be disclosed in  
15 discovery.

16           THE COURT: Based on the complaint -- I may  
17 be misremembering what's in the complaint as opposed to  
18 the briefing. But as I recall, the allegation is that  
19 Athena became aware that Smith possessed this external  
20 hard drive in 2018, September 2018.

21           MR. GUTHERY: Correct.

22           THE COURT: Apparently, that disclosure  
23 wasn't alarming to Athena.

24           MR. GUTHERY: Well, it was, Your Honor.  
25 Maybe not on the time line that Mr. Ellis had



1 mentioned, but it certainly was. But keep in mind that  
2 what we were being told was that this hard drive was an  
3 Athena hard drive that was created as part of a regular  
4 backup process while Mr. Smith was still an employee.  
5 He certainly had the authority to do that.

6 THE COURT: Right. His possession of it  
7 didn't cause Athena to think that explanation was  
8 unreasonable?

9 MR. GUTHERY: Well, it did, Your Honor. We  
10 brought the conversion and detinue action to get  
11 control of the hard drive so that we could look at it.

12 THE COURT: When did you get control of it?

13 MR. GUTHERY: In February of 2020.

14 THE COURT: Right. So a year-and-a-half  
15 later.

16 MR. GUTHERY: Well, it required us to go into  
17 the Virginia circuit court, Your Honor, and file a  
18 conversion and detinue action. It was only in the  
19 settlement of that action that we were actually given  
20 the hard drive. Athena did diligently try to gain  
21 access to the hard drive. Mr. Smith refused to turn  
22 over this hard drive that he admitted was Athena's --  
23 or that he stated was Athena's hard drive and refused  
24 to turn it over. We had to go to court to get  
25 possession of it.

1 THE COURT: I understand. All right.

2 MR. GUTHERY: The conspiracy --

3 THE COURT: Yes.

4 MR. GUTHERY: -- I think that's what we were  
5 discussing, Your Honor. And one of the exempt --  
6 arguments that Mr. Ellis made about the conspiracy  
7 statute was this intracorporate conspiracy doctrine.  
8 And we address that in our opposition, Your Honor, that  
9 there is -- Mr. Smith had just been terminated from  
10 Athena when the first of these copies apparently  
11 happened. And that unless Mr. Ellis is willing to say  
12 that Mr. Smith was immediately hired by RE  
13 Construction, there would be no intracorporate  
14 conspiracy doctrine that would prevent us from bringing  
15 this conspiracy -- prevent a conspiracy claim.

16 THE COURT: The problem is you have to say  
17 more than a conspiracy existed. I mean, it's not quite  
18 a Rule 9 standard on a fraud claim, but it's pretty  
19 close.

20 MR. GUTHERY: Yes. I understand, Your Honor.  
21 And what we have tried -- what we have alleged in the  
22 Amended Complaint was to show that close coordination  
23 or the close combination and relationship between  
24 Mr. Smith and RE Construction, both as being related to  
25 them, being an interventional employee, living in the

1 same house, being aware of each other's actions, that  
2 this together -- and the fact that RE Construction  
3 stood to gain quite a bit from Mr. Smith's access to  
4 the files. They were the bases -- our factual bases  
5 for the conspiracy claim.

6 THE COURT: All right. Anything further?

7 MR. ELLIS: Your Honor, this is Glenn Ellis.

8 THE COURT: Mr. Ellis, yes.

9 MR. ELLIS: Yeah. I would like to just work  
10 backwards to the front there. Just to be clear, the  
11 first request from Athena's counsel for the hard drive  
12 came 14 months after they learned about its existence.  
13 So they did nothing for 14 months. The complaint is  
14 completely silent about any kind of internal  
15 investigation Athena did. There is nothing in the  
16 record or in the complaint that they did anything to  
17 analyze their network, to analyze their computers, to  
18 talk to their employees, to do anything. For 14  
19 months, they did nothing.

20 Then they make a request in November 2020,  
21 and by February, they have the hard drive back. They  
22 analyze the hard drive. They get a report. If Your  
23 Honor looks at the report, the report is dated April 9,  
24 2020. They have the report that supposedly releases  
25 all the facts that support this case. They do nothing

1 with that report for 11 months, and they allow the  
2 statute both for the federal and for the Virginia  
3 Computer Crimes Act to expire. They did nothing for 11  
4 months after they supposedly had all the knowledge they  
5 needed.

6           The problem is that that report -- as Your  
7 Honor hit the nail right on the head, is that that  
8 report does not support and the inferences in -- that  
9 support and the facts in the complaint do not support  
10 the inference that Athena is trying to make.

11           That report -- the findings of that report,  
12 which are found in paragraph 16, is that my analysis  
13 located artifacts demonstrating that the hard drive was  
14 accessed between January 2016 and April 2, 2018, that  
15 the hard drive was accessed. Well, that's not in  
16 dispute. The relator's counsel accessed that hard  
17 drive and took its information to the government in  
18 2018.

19           That doesn't support a finding or an  
20 inference that Mr. Smith accessed Athena's computers.  
21 That information is completely absent from the  
22 complaint, and that information is not in the  
23 possession of the defendants. That information would  
24 be in possession of Athena. Athena could go into their  
25 computer networks and tell when files were taken off

1 and put onto this hard drive.

2           According to the report we have -- and I know  
3 there's been a reference to a subsequent conversation  
4 with Mr. Lyle. But according to the report we have,  
5 all of these files were downloaded at some point onto  
6 this hard drive before two thousand -- I think the  
7 latest one is like 2014 except for those 24 QuickBooks  
8 and medical record files. There's nothing in the  
9 report that suggests that this hard drive was hooked up  
10 to Athena's network on a certain date, that those files  
11 were downloaded onto the hard drive.

12           There's nothing, and there's nothing in the  
13 complaint that would support that kind of inference.  
14 And there's nothing in the complaint, importantly, to  
15 show that Athena has made a diligent and reasonable  
16 effort to get those answers. There's nothing that the  
17 plaintiffs show that they even tried to get those  
18 answers, to get those facts that would support their  
19 case.

20           If the computer network was scrubbed, they  
21 should be able to tell that it was scrubbed. You know,  
22 we live in a surveillance state. Surely, there would  
23 be some information or some action they could have  
24 taken. The complaint is completely silent on that.

25           With regards to this unity of purpose and

1 this issue with RE Construction, RE Construction was  
2 engaged in litigation as a subcontractor to Athena. Is  
3 there an allegation that these documents were used as  
4 part of that litigation? No. They're alleged to be a  
5 competitor. Is there an allegations that these  
6 documents were used in a bidding process to gain an  
7 advantage? No. There's no allegation that these  
8 documents were in any way misappropriated by RE  
9 Construction or used by RE Construction.

10 And, in fact, I would suggest the fact that  
11 RE Construction personnel downloaded their medical  
12 files onto this criminal apparatus -- supposed criminal  
13 apparatus shows that they were not aware that this hard  
14 drive was part of a criminal conspiracy and a criminal  
15 enterprise, as Athena suggests. It shows the exact  
16 opposite, that they had no idea what was on this hard  
17 drive.

18 So we just think the complaint is beyond  
19 threadbare. It is just a series of allegations with no  
20 support. In view of Mr. Lyle's report, it, quite  
21 frankly, verges on fabrication because the things that  
22 are being attributed to him do not appear in this  
23 report.

24 That's all I have, Your Honor.

25 THE COURT: All right.

1 MR. GUTHERY: Your Honor, may I respond very  
2 briefly?

3 THE COURT: Yes. Go ahead.

4 MR. GUTHERY: A lot of what Mr. Ellis just  
5 said are facts that he says were not contained in the  
6 complaint, and that's not what's before Your Honor.  
7 The facts that Mr. Ellis believes should have been pled  
8 in the complaint or wish that he had seen in the  
9 complaint are not there. And the reason -- it is  
10 improper, I think, for him to allege that the inference  
11 is that they simply do not exist.

12 There is discovery to take place in this case  
13 in which many of the facts that Mr. Ellis is claiming  
14 are not in the complaint will be covered. But the  
15 inferences -- he's asking you to draw inferences  
16 against Athena when that's also not where we are at  
17 this stage. The facts that we have alleged are  
18 considered true. The inferences are supposed to be  
19 drawn in our favor.

20 In this case, when the files were actually  
21 put onto the hard drive is a fact that is in dispute,  
22 at the very least, if what Mr. Ellis is saying is true.  
23 Because we believe that our expert is going to testify.  
24 It will be made very clear that these files were copied  
25 to the hard drive after Mr. Smith's termination, that

1 Mr. Ellis put into his supplemental brief that was  
2 filed, you know, 15 minutes before our opposition, so  
3 we couldn't address it in our opposition. It's not the  
4 end result of an expert -- a testifying expert's  
5 disclosed report. That is yet to come. The  
6 allegations that are in that report, the allegations  
7 that we've made in our complaint are not inconsistent.  
8 They are considered true.

9           So, Your Honor, we would encourage you to  
10 take what we know that support our claims for all of  
11 these different claims that we bring and to allow this  
12 case to go forward.

13           THE COURT: All right. Thank you.

14           Mr. Ellis, I'll give you the last word. It's  
15 your motion.

16           MR. ELLIS: The only other thing I will say,  
17 Your Honor, is that Athena hasn't issued a single  
18 request for production of documents. They haven't  
19 issued a single interrogatory. They've only sought the  
20 deposition of Mr. Smith. They're not looking for any  
21 discovery beyond the deposition of Mr. Smith. They're  
22 not looking for anything from us.

23           With regards to Mr. Lyle, they're not even  
24 allowing us -- they're objecting to us taking his  
25 deposition. This is their complaint. They need to



1 have the facts that support what happened here, at  
2 least enough to raise the inference, and it's just not  
3 here. That's why we've moved to dismiss, Your Honor.

4 THE COURT: All right. I reviewed the motion  
5 to dismiss. At this point, the Court is obligated to  
6 construe the factual allegations in the complaint in a  
7 light most favorable to the plaintiff. It's not,  
8 however, required to accept conclusory allegations.

9 I've reviewed the allegations of the  
10 complaint in detail. I think there is a real issue as  
11 to whether the allegations pertaining to when the  
12 alleged violations took place and when the information  
13 was downloaded onto the hard drive is consistent with  
14 the forensic report. The Court can't make a definitive  
15 judgment on that, frankly, and the Court doesn't need  
16 to for the purposes of ruling on this motion to  
17 dismiss.

18 Let me first take up the statute of  
19 limitations issue. Count 1 alleges a violation of the  
20 Computer Fraud and Abuse Act. The statute of  
21 limitations is two years from the date of loss or two  
22 years from the discovery of any damage. Loss is  
23 defined as any reasonable cost to any victim. Damage  
24 is defined as any impairment to the integrity or  
25 availability of data, a program, assistive information.

1           Plaintiff has alleged economic loss. It is  
2 only alleged in conclusory fashion that there was  
3 damage, and the Court does not believe that it has  
4 alleged facts that make plausible that the plaintiff  
5 has sustained damage as that term is used under the  
6 Computer Fraud and Abuse Act. All that is plausibly  
7 alleged, at most, is that files were downloaded from an  
8 Athena computer onto the external hard drive. There's  
9 no allegation that those files were corrupted in any  
10 way or that access to those files were prevented or  
11 that there was a virus infused into the computer.  
12 There isn't anything along those lines that would  
13 suggest any damage.

14           So the Court concludes that there's a  
15 two-year statute of limitations that begins from the  
16 date of loss, which is alleged here as no later than  
17 February 15, 2016.

18           With respect to Counts 2, 3, 4, and 6,  
19 plaintiff alleges violations of several of the state  
20 criminal statutes under the Virginia Computer Crimes  
21 Act. The set limitations period under those statutes  
22 are the earlier of five years from the last act in the  
23 course of conduct constituting a violation or two years  
24 after the plaintiff discovers or reasonably should have  
25 discovered the last act.

1           Again, the allegations in the complaint  
2 allege that the violation took place on February 15,  
3 2016. The case was filed on March 1, 2021, beyond the  
4 five-year statute irrespective of whether the statute  
5 of limitations would not have expired under the  
6 two-year statute. Although, again, it appears that it  
7 would have expired under the two-year statute as well.

8           With respect to Count 5 -- let me come back  
9 to Count 5.

10           Let me go to the conspiracy claims. Count 6  
11 alleges business conspiracy. Count 7 alleges  
12 common-law conspiracy. There's really no allegations  
13 here that plausibly allege a conspiracy. All that is  
14 alleged is that Smith engaged in his conduct before he  
15 became an employee. He subsequently became an  
16 employee. There are no allegations of any  
17 communications between the two before he joined, no  
18 facts from which you could plausibly infer that there  
19 was any concerted action, no communications. There's  
20 no allegations that even the material on that hard  
21 drive was used in the business of RE Construction, no  
22 allegations of any time, place, manner, or discussions  
23 of any of the aspects necessary for a conspiracy claim.  
24 And, again, really nothing more than just a naked  
25 allegation of conspiracy. So the Court finds the

1 complaint does not plausibly allege facts that support  
2 Count 6 or Count 7.

3           With respect to the substantive claims, under  
4 all of them -- and this is all the counts -- as to RE  
5 Construction, the Court simply does not find any facts  
6 that plausibly allege any violation of any of the  
7 statutes on the part of the corporation. There's no  
8 allegations that, again, they knew about Smith's  
9 conduct, that they utilized any of that information to  
10 their business advantage. All of those facts are  
11 simply lacking, and the Court can't conclude that the  
12 plaintiff has alleged substantive claims against the  
13 corporation under any of those counts.

14           With respect to the Trade Secrets Act, again,  
15 I don't think the complaint plausibly alleges the  
16 information was utilized as trade secrets or gave any  
17 kind of competitive advantage. Again, this is pretty  
18 threadbare conclusory types of allegations.

19           I wanted to speak to one other piece of this,  
20 if I could.

21           I think those are the two points I wanted to  
22 make. One is I think the allegations are too  
23 conclusory to establish there were trade secrets or  
24 that either of the defendants misappropriated those as  
25 required under the statute.

1           So for all of those reasons, the Court is  
2 going to grant the motion to dismiss all of the counts  
3 of the complaint. All right.

4           MR. DOWNEY: Judge, did you have something  
5 else you wanted to say about Count No. 5? You were in  
6 the middle of talking about that.

7           THE COURT: That's the trade secrets count.

8           MR. ELLIS: Your Honor, this is Glenn Ellis.

9           THE COURT: Yes.

10          MR. ELLIS: The only thing else I would ask,  
11 Your Honor, is that you make the dismissal with  
12 prejudice. Again, this is the third lawsuit filed.

13          THE COURT: Well, a granting of a motion to  
14 dismiss is with prejudice. All right.

15          MR. ELLIS: Thank you, Your Honor.

16          MR. GUTHERY: Thank you, Your Honor.

17          MR. DOWNEY: Thank you, Judge.

18          THE COURT: The Court thanks counsel.

19          The Court will stand in recess.

20          (The time is 10:15 a.m.)

21                               -----  
22                               Time: 10:15 a.m.

23           I certify that the foregoing is a true and  
24 accurate transcription of my stenographic notes.

25   /s/  
Rhonda F. Montgomery, CCR, RPR